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Supreme Court, U.S.
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No. 04-1012

IN THE

# Supreme Court of the United States

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ERNEST B. HAIRE, III,
*Petitioner*,

v.

DEBORAH R. MESHULAM, Receiver,
*Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

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DEBORAH R. MESHULAM *
DLA PIPER RUDNICK GRAY CARY LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 861-3900

* Counsel of Record

*Respondent*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the exercise of nationwide service of process arising in an ancillary action to a federal receivership proceeding satisfies due process concerns where the receiver perfected her appointment in the judicial district where the defendant resides and there is no evidence of inconvenience or burden on the defendant that rises to a level of Constitutional concern.

2. Whether venue of an action ancillary to a federal receivership case is proper in the receivership court when the receiver perfected her appointment in the judicial district where the defendant resides.

## LIST OF PARTIES

The Petitioner is Ernest B. Haire, III. The Respondent is Deborah R. Meshulam, Esq., as Receiver. The Receiver was appointed by the United States District Court for the District of Columbia to satisfy Securities and Exchange Commission disgorgement judgments entered against Paul A. Bilzerian. There is no parent or subsidiary corporation of any party to be listed.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

The Respondent Deborah R. Meshulam, Receiver, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the District of Columbia Circuit's opinion in this case. That opinion is reported at 378 F.3d 1100.

## OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 378 F.3d 1100, and is reprinted in appendix to the Petition for Writ of Certiorari at A1-20.

## JURISDICTION

The Respondent Receiver invoked the jurisdiction of the United States District Court for the District of Columbia pursuant to 28 U.S.C. §§ 754 and 1692. The United States

Court of Appeals of the District of Columbia Circuit entered judgment on August 13, 2004, and denied a motion for rehearing on October 26, 2004. Mr. Haire has invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

The statutory provisions involved in this case are 28 U.S.C. §§ 754 and 1692, which are reprinted in the appendix to the Petition for Writ of Certiorari at A35-36.

## COUNTERSTATEMENT OF THE CASE

This is an action ancillary to a federal receivership that was established as adjunct to an enforcement proceeding brought by the Securities and Exchange Commission (the "SEC") against Paul A. Bilzerian in 1989. *SEC v. Bilzerian*, 127 F. Supp. 2d 232 (D.D.C. 2000).[1] The Receivership Estate was established in order to satisfy decade old disgorgement judgments entered against Mr. Bilzerian in 1993 in excess of $60 million. *Id.*; *Securities and Exchange Comm'n v. Bilzerian*, 814 F. Supp. 116 (D.D.C. 1993) and *Securities and Exchange Comm'n v. Bilzerian*, 1993 WL 542584 (D.D.C. Jun. 25, 1993), *aff'd* 29 F.3d 689 (D.C. Cir. 1994). The Receiver perfected her appointment in multiple judicial districts, including the Middle District of Florida where Mr. Haire resides.

In August 2000, the District Court held Mr. Bilzerian in contempt of the disgorgement judgments. *Securities and Exchange Comm'n v. Bilzerian*, 112 F. Supp. 2d 12, 17 (D.D.C. 2000). This result was based, among other things, on the Court's finding that Mr. Bilzerian had "transferred his sub-

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[1] The main action was brought by the SEC against Mr. Bilzerian under the federal securities laws following Mr. Bilzerian's criminal conviction for securities fraud and conspiracy to defraud the United States. *See United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991), *cert. denied*, 502 U.S. 813 (1991).

stantial assets into a complex ownership structure of off-shore trusts and family-owned companies and partnerships," including the Paul A. Bilzerian and Terri L. Steffen 1994 Irrevocable Trust (the "1994 Trust") and Overseas Holdings Limited Partnership ("OHLP"). *Id.* at 18-19. Petitioner Ernest B. Haire, III is a trustee of the 1994 Trust, and is Mr. Bilzerian's neighbor.

During the pendency of the contempt proceeding against Mr. Bilzerian, OHLP purportedly lent Mr. Haire $1 million. In exchange, Mr. Haire executed a promissory note in favor of OHLP (the "$1 Million Note" or the "Note"). The Note is a Receivership asset and is the subject of the proceedings below.

In December 2000, the Court created the Receivership Estate, appointed Deborah R. Meshulam as Receiver, required that all assets be turned over to her, and authorized her to:

> [T]ake such actions as are necessary and appropriate to identify, recover, preserve, take control of and prevent the dissipation, concealment or disposition of any assets of Bilzerian, and to liquidate any interests in any asset held by anyone on behalf of Bilzerian, including, but not limited to the initiation and prosecution of litigation against others to recover such asset and/or interests in assets on behalf of the Receivership Estate.

*Securities and Exchange Comm'n v. Bilzerian*, 127 F. Supp. 2d 232, 233 (D.D.C. 2000); *aff'd* Nos. 01-5008, 01-5242, 01-5264, 02-5033, 02-5060, 2003 WL 22176183 (D.C. Cir. Sept. 22, 2003).

Upon her appointment, the Receiver put Mr. Haire on notice of the Receivership Order by serving him with a copy of the Order in December 2000 and again in February 2001; at that time, the Receiver also notified Mr. Haire that, pursuant to the terms of the Order, (1) the Receivership Estate is comprised of Mr. Bilzerian's interests in assets including, among other things, the assets of OHLP, (2) Mr. Haire was

required to provide the Receiver with access to assets, books, records and other property of OHLP, and (3) the District Court had exclusive jurisdiction over the Receivership Estate. In addition, in her February 2001 correspondence, the Receiver provided Mr. Haire with copies of District Court orders holding Mr. Bilzerian in contempt and, thereafter, incarcerating him for his failure to provide documents and information related to various entities including OHLP. Mr. Haire never denied receiving these notices.

At the time the Receiver served Mr. Haire with the Receivership Order and notified him of his obligation to provide her with access to assets and records of OHLP, the $1 Million Note was due and payable; Mr. Haire owed OHLP $1 million, plus a late fee and other associated amounts. Rather than advise the Receiver of his debt to OHLP as required by the Receivership Order, Mr. Haire acted in secret and in concert with OHLP to alter substantially the $1 Million Note by executing a Forebearance and Extension Agreement "as of" March 1, 2001. That Agreement purported to extend the Note, which was then due and owing, until March 2003. At that time, acting again in secret and in concert with OHLP and Bilzerian allies, Mr. Haire also purported to make an interest payment on the $1 Million Note, but diverted that payment to Bilzerian-nominees, rather than sending it to the Receiver or OHLP.

Pursuant to a Consent Judgment subsequently entered in the Receivership proceeding in January 2003, OHLP assigned 100% of its interest in the $1 Million Note to the Receivership Estate. Mr. Haire had notice of the Consent Judgment, consented to it in his capacity as a trustee of the 1994 Trust and did not object to it in any capacity. Nevertheless, Mr. Haire subsequently attempted to appeal entry of the Consent Judgment. The United States Circuit Court for the District of Columbia dismissed that appeal for lack of standing. *Securities and Exchange Comm'n v. Bilzerian*, No. 02-5061,

2002 WL 1998001 (D.C. Cir. Aug. 29, 2002). Thereafter, that Court affirmed the Consent Judgment. *Securities and Exchange Comm'n v. Bilzerian*, Nos. 01-5008, 01-5242, 01-5264, 02-5033, 02-5060, 2003 WL 22176183 (D.C. Cir. Sept. 22, 2003).

Following OHLP's assignment of the Note to the Receivership Estate, Mr. Haire defaulted on the Note. Pursuant to the Note's terms, the Receiver declared the entire amount immediately due and payable. When Mr. Haire failed to repay the $1 Million Note to the Receivership Estate, the Receiver commenced this ancillary action in order to recover those funds and discharge her duty to collect and liquidate Receivership Assets for the purpose of satisfying the civil disgorgement judgments entered against Mr. Bilzerian. In accordance with the Receivership Order vesting the Receivership Court with exclusive jurisdiction over the Receivership Estate, the ancillary action was filed in the District Court for the District of Columbia.

Mr. Haire waived service of the summons and subsequently the Receiver filed a motion for summary judgment. Mr. Haire responded by filing a motion to dismiss the Receiver's complaint and opposing the Receiver's motion for summary judgment on the grounds of lack of personal jurisdiction, forum non conveniens and failure to name OHLP as an indispensable party. The Receivership Court denied Mr. Haire's motion to dismiss and granted the Receiver's motion for summary judgment. The Receivership Court found that it had personal jurisdiction over Mr. Haire pursuant to the authorization of nationwide service of process in 28 U.S.C. § 1692, and that venue of the action ancillary to the Receivership proceeding was proper in the Receivership Court. The United States District Court for the District of Columbia Circuit affirmed.

## REASONS FOR DENYING THE PETITION

### I. THERE IS NO SPECIAL NEED FOR THIS COURT'S GUIDANCE ON THE JURISDICTIONAL ISSUES RAISED BY MR. HAIRE.

#### A. There is No Circuit Split or Other Circumstance Warranting This Court's Review of the Predicate Statutory Question.

The constitutional question presented by Mr. Haire assumes that the governing statute—28 U.S.C. § 1692—authorizes nationwide service of process. In a footnote to his petition, however, Mr. Haire indicates that he also seeks review of that issue, which he contends is "fairly included" in his constitutional question.[2] Pet. at 5 n.1.

Assuming that this issue is properly before the Court, whether 28 U.S.C. § 1692 authorizes nationwide service of process is not a question on which this Court's guidance is

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[2] The question presented is narrowly framed and focuses on the requirements of the Due Process Clause "when a court exercises personal jurisdiction by virtue of a federal statute authorizing nationwide service of process." Thus, rather than including the question of whether section 1692 authorizes nationwide service of process, the question, as presented, appears to expressly exclude it. Nevertheless, in light of footnote 1 and the Court's longstanding reluctance to address a constitutional issue without first confirming that there is a statutory basis for its consideration, the Receiver addresses the statutory question herein. *See Fry v. United States*, 421 U.S. 542, 546 n.5 (1975) (addressing whether the Economic Stabilization Act of 1970 applied to state employees before considering the Act's constitutionality, notwithstanding the petitioners' failure to raise the statutory issue in either their petition or their brief; "Rather than decide a constitutional question when there may be doubt whether there is any statutory basis for it [], we deal first with the statutory question . . . ."); *United States v. Grace*, 461 U.S. 171, 175-76 (1983) ("Our normal course is first to 'ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'") (citations omitted).

needed. Indeed, Mr. Haire fails to identify even one reason why certiorari should be granted on this issue.

There are, however, three reasons why certiorari is not proper. First, it is premature for this Court to consider whether section 1692 authorizes nationwide service as only three federal circuits have addressed this issue. Second, because those three courts have all concluded that the statute does authorize nationwide service of process, there is no circuit split to resolve. *Securities and Exchange Comm'n v. Bilzerian*, 378 F.3d 1100, 1103 (D.C. Cir. 2004); *Securities and Exchange Comm'n v. Vision Communications, Inc.*, 74 F.3d 287, 288 (D.C. Cir. 1996); *American Freedom Train Foundation v. Spurney*, 747 F.2d 1069, 1073 (1st Cir. 1984); *Hale v. Henderson Nat. Bank*, 657 F.2d 816, 817 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982).[3] With one exception, the district courts are in accord. *See, e.g., Terry v. Dempsey*, No. Civ. A. 3:04 CV 00040, 2004 WL 3135469 (W.D. Va. Nov. 12, 2004); *U. S. Small Bus. Admin. v. Chimicles*, No. 03-5987, 2004 WL 2223304 (E.D. Pa. Sept. 22, 2004); *Terry v. June*, No. Civ. A 3:03 CV 0047, 2003 WL 21738299 (W.D. Va. July 21, 2003); *Securities and Exchange*

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[3] Mr. Haire cites to *Gilchrist v. General Electric Capital Corp.*, 262 F.3d 295, 301 (4th Cir. 2001), for the proposition that a court's *in rem* jurisdiction over receivership property is not synonymous with personal jurisdiction over persons residing in other districts. Pet. at 6-7 n. 2. Mr. Haire fails to explain the relevance of *Gilchrist* to his petition and there is none. In *Gilchrist*, the Fourth Circuit merely opined that, standing alone, section 754—which extends the receivership court's *in rem* jurisdiction to districts where the receiver timely files the governing complaint and order of appointment—does not vest the court with coextensive personal jurisdiction over persons in such other districts. Significantly, however, the Fourth Circuit did not address the interplay between 28 U.S.C. §§ 754 and 1692 that serves as the statutory basis for jurisdiction here. Indeed, the Court did not even address section 1692 and specifically stated that it was "not rul[ing] on the question whether the district court has personal jurisdiction over the Georgia creditors" as that issue had "been addressed neither by the parties nor by the district court." *Id.* at 301-02.

*Comm'n v. Cook*, 2001 WL 803791 (N.D. Tex. 2001); *Select Creations, Inc. v. Paliafito America, Inc.*, 852 F. Supp. 740, 781 (E.D. Wis. 1994). *But see Stenger v. Leadenhall Bank & Trust Co.*, No. 02 C 8655, 2004 WL 609795, at *8 (N.D. Ill. March 23, 2004) (finding 28 U.S.C. §§ 754 and 1692 did not authorize nationwide service of process); *Stenger v. World Harvest Church, Inc.*, No. 02-C-8036, 2003 WL 22048047, at *2 (N.D. Ill. Aug. 29, 2003) (same). Third, compared to the frequency with which other procedural rules and statutes are put at issue, section 1692 is not often invoked. Accordingly, there is no compelling reason for the Court to use its power of certiorari to address this statute.

### B. The Court Should Decline Petitioner's Invitation to Address the Constitutional Issue Presented Because Guidance is Not Needed on the Predicate Statutory Question, the Circuit Split Concerning the Appropriate Due Process Analysis is Not Well Developed and Has Not Resulted in Inconsistent Outcomes and This Case is Not an Appropriate Vehicle to Address the Conflict.

#### 1. *The Predicate Statutory Question Is Not One On Which the Court's Guidance Is Needed.*

The existence of "a national service provision is a necessary prerequisite for a court to even consider a national contacts approach." *Go Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (*citing Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102-03 n.5 (1987)). As discussed in Section I, *supra*, this predicate statutory question does not satisfy any of this Court's criteria for isuance of certiorari. Accordingly, certiorari should also be denied on the constitutional question which follows therefrom.

### 2. *The Asserted Conflict is Not Well Developed and Has Not Resulted in Inconsistent Outcomes.*

Where a federal statute authorizes nationwide service of process, there is a general agreement among the circuits that a court should "examine a defendant's aggregate contacts with the nation as a whole rather than his contacts with the forum state in conducting the Fifth Amendment analysis." *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947 (11th Cir. 1997) (citation omitted). *See also Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1180 (9th Cir. 2004); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002); *cert. denied*, 523 U.S. 1048 (1998); *Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000); *Peay v. Bellsouth Medical Assistance Plan*, 205 F.3d 1206, 1211 (10th Cir. 2000); *In re Federal Fountain, Inc. v. KR Entertainment, Inc.*, 165 F.3d 600, 602 (8th Cir. 1999); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997); *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d 1255, 1257-58 (5th Cir. 1994); *United Liberty Life Ins. Co. v. Ryan*, 985 F.2d 1320, 1330 (6th Cir. 1993); *Trans-Asiatic Oil Ltd. v. Apex Oil Co.*, 743 F.2d 956, 958 (1st Cir. 1984); *Mariash v. Morrill*, 496 F.2d 1138, 1142-43 (2d Cir. 1974).

The issue on which the circuits appear to diverge is whether the due process analysis ends with a finding of the defendant's "national contacts." The majority of circuits appear to conclude that it does. *See, e.g., Bilzerian*, 378 F.3d at 1106 n.8; *Federal Fountain*, 165 F.3d at 602; *Trans-Asiatic*, 743 F.2d at 958; *Mariash*, 496 F.2d at 1143. Several circuits, however, have opined that "due process requires something more." *Peay*, 205 F.3d at 1210. Specifically, the Tenth and Eleventh Circuits have held that when the defendant is served via a statute authorizing nationwide service of process, "the Fifth Amendment requires the

plaintiff's choice of forum to be fair and reasonable to the defendant." *Peay*, 205 F.3d at 1212; *Panama*, 119 F.3d at 945. *See also Denny's, Inc. v. Cake*, 364 F.3d 521, 524 n.2 (4th Cir. 2004) (finding that the district court would have personal jurisdiction over California officials pursuant to ERISA's nationwide service of process statute as long as the case before it was a proper ERISA enforcement action and "assume[ing] that the assertion over the commissioner would satisfy Fifth Amendment due process requirements"); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 370 (3d Cir. 2002) ("This Court has not issued an authoritative ruling on the matter, although we have hinted that a fairness analysis consisting of more than an assessment of the defendant's national contacts would be appropriate") (citations omitted).

For three reasons, however, the distinction between the foregoing analyses is one without a difference. First, even some courts which Mr. Haire identifies as adopting a pure "national contacts" approach appear to recognize that due process might prohibit the exercise of personal jurisdiction in exceptional cases.[4] Second, although the Tenth and Eleventh Circuits require more than just a showing of "national contacts" and hold that Due Process prevents a court from exercising personal jurisdiction over a litigant where it would be unduly burdensome for the litigant to defend in that forum, these courts have "emphasize[d] that it is only in *highly*

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[4] *See Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1036 (7th Cir. 2000) (noting that *Peay* "relied on the observation in *Omni Capital*, 484 U.S. at 104, that restrictions on state adjudication enable litigants to preserve their liberty and property from arbitrary confiscation. No one doubts this; Congress could violate the due process clause by requiring all federal cases to be tried in Adak (the westernmost settlement in the Aleutian Islands), because transportation costs easily could exceed the stakes and make the offer of adjudication a mirage. But this principle is unrelated to any requirement that a defendant have 'contacts' with a particular federal judicial district and does not block litigation in easy-to-reach forums.")

*unusual* cases that inconvenience will rise to a level of constitutional concern." *Panama*, 119 F.3d at 947 (emphasis added); *id.* (describing such circumstances as "rare"); *accord Peay*, 205 F.3d at 1212.

Finally, the different analyses applied by these circuits have not resulted in inconsistent outcomes. Although the *Peay* and *Panama* courts hold that Due Process protects a litigant served with nationwide process from having to defend in an excessively burdensome forum, neither those decisions nor the district courts within the Tenth and Eleventh Circuits that have subsequently applied them have found a constitutionally significant inconvenience that would preclude the exercise of jurisdiction. *See Peay*, 205 F.3d at 1213 (concluding that "defendants cannot show that their liberty interests actually have been infringed"); *Panama*, 119 F.3d at 948 (finding "no constitutional impediment to jurisdiction"); *Wing v. Storms*, No. 1:02CV127DAK, 2004 WL 724448, at *2 (D. Utah Feb. 5, 2004) (applying *Peay* analysis to a defendant served with a Receiver's complaint, but concluding "that Defendant has not met his burden of demonstrating that the inconvenience of defending a lawsuit in Utah rises to a level of constitutional concern"); *Brightway Adolescent Hospital v. Hawaii Mgmt Alliance* Ass'n, 139 F. Supp. 2d 1220 (D. Utah 2001) (finding defendant failed to demonstrate that assertion of jurisdiction would be so burdensome as to render it unconstitutional, notwithstanding the distance from Utah to Hawaii). *See also Medical Mutual of Ohio v. Desoto*, 245 F.3d 561, 568 (6th Cir. 2001) (reaffirming propriety of national contacts analysis, but noting that "[e]ven if we were to agree with the Tenth and Eleventh Circuits, we would find jurisdiction here"); *ESAB Group*, 126 F.3d 617 (finding that jurisdiction was properly exercised because there was no evidence of "extreme inconvenience or unfairness" to the defendants); *Terry v. Dempsey*, 2004 WL 3135469, at *3 ("[T]his court finds no evidence of such 'extreme inconvenience or unfairness' as would outweigh the 'congressional

policy behind the authorization of nationwide service of process provided by section 1692'") (citation omitted); *Terry v. June*, 2003 WL 21738299, at *5 (finding the burden faced by a Michigan resident having to defend an action brought by a Receiver in Virginia "is not so extreme as to implicate Due Process protections").

### 3. *This Case Is Not an Appropriate Vehicle to Resolve the Conflict.*

Even assuming a significant conflict existed among the Circuits, this case is not the appropriate vehicle for addressing the asserted conflict because, regardless of the analysis applied, the outcome here would be the same. Specifically, Mr. Haire cites to no evidence in the record demonstrating that the District Court's assertion of jurisdiction over him would have resulted in a constitutionally significant inconvenience.

"[T]he burden is on the defendant to show that the exercise of jurisdiction in the chosen forum will make litigation 'so gravely difficult and inconvenient' that [he] unfairly is at a 'severe disadvantage' in comparison to his opponent." *Panama*, 119 F.3d at 948 (citing *Burger King Corp.*, 471 U.S. at 478). *See also Denny's*, 364 F.3d at 524 n.2 (rejecting defendant's "tentative[]" argument that the exercise of personal jurisdiction violated the Fifth Amendment because the "Commission has not demonstrated that the district court's assertion of personal jurisdiction over him would result in 'such extreme inconvenience or unfairness as would outweigh the congressionally articulated policy' evidenced by a nationwide service of process provision") (*citing ESAB Group*, 126 F.3d at 627). In the case below, Mr. Haire did not acknowledge or proffer any evidence that would satisfy this burden.

Instead, Mr. Haire's argument below focused on his asserted lack of contacts with the District of Columbia. The fact that a litigant does not have any contacts with a forum, however, does not mean that it would be unfair or unduly burdensome for him to litigate there. *See Panama*, 119 F.3d at 946 ("[A] defendant's contacts with the forum state play no magical role in the Fifth Amendment analysis."); *Heft v. AAI Corp.*, 355 F. Supp. 2d 757, (M.D. Pa. Jan. 24, 2005) ("State borders do not deserve significant weight in evaluating the fairness of haling a defendant into federal court") (citations omitted); *Oxford v. PNC*, 372 F. Supp. 191, 201 (E.D. Pa. 1974) ("In this age of instant communication, due process cannot be measured by the number of state borderlines one must cross. It is certainly no farther from Beaumont in the Eastern District of Texas to El Paso in the Western District of Texas (*cf.* Rule 4(f) extending a federal court's process to the territorial limits of a state), than from Portland, Me. to Raleigh, N.C. across twelve state borderlines").

"[I]n evaluating whether the defendant has met his burden 'of establishing constitutionally significant inconvenience,'" the Tenth Circuit directs courts to look at the following factors:

> (1) the extent of the defendant's contacts with the place where the action was filed; (2) the inconvenience to the defendant of having to defend in a jurisdiction other than that of his residence or place of business, including (a) the nature and extent and interstate character of the defendant's business, (b) the defendant's access to counsel, and (c) the distance from the defendant to the place where the action was brought; (3) judicial economy; (4) the probable situs of the discovery proceedings and the extent to which the discovery proceedings will take place outside the state of the defendant's residence or place of business; and (5) the nature of the regulated activity in question and the extent of impact that the

> defendant's activities have beyond the borders of his state of residence or business.

*Peay*, 205 F.3d at 1212.

Although Mr. Haire denies that he had any contacts with the District of Columbia, his Statement of Facts conveniently omits one significant transaction which was knowingly and purposefully directed at the Receivership Estate. Soon after the creation of the Receivership Estate, Mr. Haire received at least two separate notices that assets of OHLP (such as the $1 Million Note) were assets of the Estate and that they were within the exclusive jurisdiction of the District Court for the District of Columbia. Acting with such knowledge, Mr. Haire extended the terms of the Note and diverted payments thereunder to Bilzerian nominees. Because Mr. Haire knew that the Note was property of the Receivership Estate and, acting with such knowledge, affirmatively modified it, he knew or should have known that a dispute concerning such conduct could arise in the Receivership Court. *See Burger King v. Rudzewicz*, 471 U.S. 462, 474 (1985) (concluding that due process is satisfied when the "'defendant's . . . connection with the forum state . . . [is] such that he should reasonably anticipate being haled into court here'") (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)); *Peay*, 205 F.3d 1206, 1211-12 ("Due process limits on a court's ability to exercise jurisdiction 'are designed to protect [defendants] by providing them with fair notice that their activities will render them liable to suit in a particular forum'") (citations omitted); *id.* at 1213 ("Because defendants rendered benefits in Utah, they knew or should have known that a dispute over benefits could arise in Utah"). *Cf. Asahi Metal Industry Co. v. Supreme Court*, 480 U.S. 102, 113 (1987) ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*") (emphasis in original) (internal citations omitted).

Furthermore, although Mr. Haire may have been minimally inconvenienced by having to litigate in the District of Columbia, he did not and "cannot show that this burden rises to the level of a constitutional concern." *Peay*, 205 F.3d at 1213. There is nothing in the record demonstrating that he lacked the financial resources to hire counsel to represent him in the District. To the contrary, Mr. Haire obtained and was represented by counsel in the Circuit Court below. Further, the District of Columbia is hardly a remote distance from Mr. Haire's residence in Tampa, Florida. Moreover "modern methods of communication and transportation greatly reduce the significance" of this distance. *Peay*, 205 F.3d at 1213. *See also ESAB*, 126 F.3d at 627 (upholding South Carolina court's exercise of jurisdiction over New Hampshire residents, finding that the inconvenience caused by the distance "is not so extreme as to defeat the exercise of personal jurisdiction pursuant to valid service of process, although it may certainly factor into a transfer decision"); *Brightway Adolescent Hospital*, 139 F. Supp. 2d at 1224 (finding personal jurisdiction proper under the *Peay* test; "Although the distance between Utah and Hawaii is significant, HMAA has not persuaded the court that defending this action in Utah rises to a level of constitutional concern given modern modes of transportation and communication").

In addition, nothing in the record demonstrates that judicial economy or the probable situs of discovery renders the District of Columbia a constitutionally burdensome forum. As the record below demonstrates, this case was summarily resolved and thus discovery was not necessary. Further, judicial economy is well served by keeping all receivership proceedings in the Receivership Court which has overseen and, thus has knowledge, regarding the various transactions through which Mr. Bilzerian transferred his funds, including

the $1 Million Note.[5] Finally, even assuming that Mr. Haire had satisfied his burden of showing a constitutionally significant inconvenience, jurisdiction would still have been properly exercised once the federal interests at stake are taken into account. *See Panama*, 119 F.3d at 948 ("When a defendant makes a showing of constitutionally significant inconvenience, jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant"). In this case, there is a significant federal interest in litigating the dispute in the Receivership Court because of the economies of doing so and, further, to ensure that the federal securities laws are finally vindicated through satisfaction of the judgments entered by the Receivership Court in 1993. *See Federal Fountain*, 165 F.3d at 602 ("We note, too, that the vindication of federal law principles in a federal court would seemingly always be sufficient to carry the day in favor of the exercise of federal jurisdiction, even if we felt obligated to engage in a balancing enterprise, which, in fact, we do not").

## II. THERE IS NO SPECIAL NEED FOR THIS COURT'S GUIDANCE ON THE PROPER VENUE OF ANCILLARY ACTIONS.

Mr. Haire's request for this Court's review of the venue of this action is premised on misleading and incorrect characterizations of the ruling below. As alleged in the complaint, this action was brought as an ancillary proceeding to accomplish the objectives of the Receivership Order in the main case by recovering on an asset belonging to the Receivership Estate. The D.C. Circuit found that because

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[5] The final factor is inapposite or insignificant here. *Cf. Oxford First Corp. v. PNC Liquidating Corp.*, 372 F. Supp. 191, 205 (E.D. Pa. 1974) (finding the exercise of jurisdiction meets the fairness test, while noting the fifth factor "is not important" in the case before it).

venue of the main Receivership proceeding is proper, venue of this ancillary action in the Receivership Court is proper. Pet. App. at 15.

The D.C. Circuit's ruling is consistent with that of the other circuit that has addressed this issue. *See Haile*, 657 F.2d at 922 n.6 ("[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well"). Moreover, treatises have recognized that ancillary claims need not meet venue requirements. *See, e.g.*, Wright & Kane, Federal Practice and Procedure: Federal Practice Deskbook § 10 (2002) ("It was usually held that where ancillary jurisdiction sufficed to allow a claim or a party without independent jurisdictional grounds, it was also unnecessary to satisfy the venue statutes with regard to that claim or party"); Wright, The Federal Courts 4th § 9 at 32 (1983) (same); Moore's Federal Practice 3d § 110.06 (2004) ("[T]hird-party claims joining new parties [to an existing action] need not meet venue requirements because they are regarded as ancillary to the existing suit").

Notably, Mr. Haire does not identify any circuits that have held to the contrary. His reliance on language from this Court's decision in *Olberding, Doing Business as Vess Transfer v. Illinois Central Railroad*, 346 U.S. 338, 340 (1953), and statements in other cases by the Fifth and Eighth Circuits is misplaced. Each of those cases involved venue of an original, as opposed to an ancillary, action and are, therefore, inapposite. Further, none indicate disapproval of the notion of ancillary venue. Moreover, the Seventh Circuit has noted that the receivership statute authorizes venue of an ancillary action in the appointing court. *See Scholes v. Lehmann*, 56 F.3d 750, 753 (7th Cir. 1995) (finding that 28 U.S.C. § 754 "allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country").

Mr. Haire also seeks review of another issue related to venue that he contends is "fairly included" within the issue discussed above: "[w]hether a valid forum selection clause in a contract automatically becomes unenforceable whenever one of the parties to the contract assigns his rights to a federal receiver." Pet. at 17 n.5. This fundamentally mischaracterizes the D.C. Circuit Court's ruling. The D.C. Circuit Court did not hold that the forum clause in the $1 Million Note should be "disregarded." Rather, the D.C. Circuit Court enforced that forum selection clause, which expressly permits venue in other districts as the law requires. *See* Pet. App. at 16 (reproducing the forum selection provision, which selects courts in Hillsborough County, Florida "unless it shall be lawfully required that venue for any legal proceeding lie elsewhere"). Accordingly, this case does not present an occasion for the Supreme Court to determine whether a forum selection clause is unenforceable in an action brought by a receiver.

Finally, the laying of proper venue in an ancillary case is not worthy of the Supreme Court's review because it is irrelevant to a case brought under the receivership statute. In such a case, a receiver's compliance with 28 U.S.C. § 754 expands the territorial jurisdiction of the receivership court to all districts in which property of the receivership can be found pursuant to 28 U.S.C. § 1692. Because the Receiver complied with 28 U.S.C. § 754 in the Middle District of Florida in this case, the territorial jurisdiction of the D.C. District Court expanded to that District where Mr. Haire could be found for purposes of this action. As a result, the venue statute for federal actions, 28 U.S.C. § 1391 and the forum clause in the $1 Million Note were satisfied.

## CONCLUSION

For all of the foregoing reasons, the Court should deny Mr. Haire's petition for certiorari. There is no conflict to be

addressed here or other circumstances warranting this Court's review, only the particular claim of a disappointed litigant who is unhappy with the outcome in his particular case.

Respectfully submitted,

DEBORAH R. MESHULAM *
DLA PIPER RUDNICK GRAY
CARY LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 861-3900

* Counsel of Record

*Respondent*

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